Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term 2000

JOSEPH KEVIN LEJEUNE,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals in Houston Texas

PETITION FOR A WRIT OF CERTIORARI

COLIN B. AMANN
Counsel of Record
GAITHER & AMANN
4300 Scotland
Houston, Texas 77007
713.865.5600
Counsel for Petitioner

ALPHA LAW BRIEF COMPANY (713) 270 - 6604

58 pp

QUESTION PRESENTED

Did the exclusion of evidence regarding the previous sexual conduct of the complaining witness violate Lejeune's rights under the Sixth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to this proceeding are petitioner Joseph Kevin Lajeune and respondent The State of Texas.

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Joseph Kevin Lejeune respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported.[1]

JURISDICTION

The Court of Appeals entered its judgment on March 23, 2000.[2] A motion for *en banc* rehearing was filed on April 18, 2000. That motion was ultimately denied on July 13, 2000.[3]

A petition for discretionary review was filed on August 15, 2000, and an amended petition for discretionary review was filed with the Court of Criminal Appeals on October 12, 2000. The petition was refused on November 1, 2000.[4]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. LeJeune seeks review from a final state court decision where his rights under the Sixth Amendment to the United States Constitution were specifically set up and claimed.

CONSTITUTIONAL AMENDMENTS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...."

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[1] *See* App., *infra*, 1a.

[2] *Id.*

[3] *See* App., *infra*, 11a.

[4] *See* App., *infra*, 12a.

STATEMENT OF THE CASE

i. Factual Background

The alleged sexual assault occurred on July 10, 1996. The complaining witness, Amber McCoy, did not tell her step-father and mother about the alleged assault until July 16, 1996. And she did so only after her mother and her step-father confronted her about some sexually explicit language she had used with her six-year-old brother.[5]

During this confrontation, Amber's step-father demanded to know if Amber "was still a virgin." [6] He was screaming at her wanting to know if she had ever had sex. Amber's mother was crying and Amber was crying. [7] Amber thought she was "in trouble."[8] This is when she tells her mother and step-father that LeJeune sexually assaulted her a week earlier at the apartment complex swimming pool. Because of this alleged assault, Amber no longer considered herself a virgin.[9]

Psychotherapist Cindy Smiley treated Amber McCoy in July 1996. Based on Amber's statements -- which were utilized for purposes of treatment and diagnosis[10] -- Smiley diagnosed

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[5] *Reporter's Record* at 105-107; 130-132; 353-354.

[6] *Reporter's Record* at 131.

[7] *Reporter's Record* at 131-132; 354.

[8] *Reporter's Record* at 356.

[9] *Reporter's Record* at 107; 356.

[10] *Reporter's Record* at 262.

Amber as suffering from post-traumatic stress syndrome.[11] She stated that Amber's symptoms were consistent with her claim of having been sexually assaulted.[12]

Smiley testified before Amber McCoy. Because her notes had been disclosed, LeJeune knew about the statements Amber made to Smiley. The information gleaned from these notes supplied the basis for LeJeune to explore various areas of inquiry through cross-examination.

For example, Amber informed her therapist about a consensual sexual episode she had experienced a few months earlier. According to Smiley's notes, when Amber told her mother about this incident, she got into big trouble. The *trouble* consisted of Amber's step-father and mother screaming, cussing, and threatening that they would not support either Amber or her child if she became pregnant.[13]

LeJeune tried to question Smiley about – and introduce her notes of – the statements made to her by Amber during treatment. LeJeune also attempted to question Amber and Laura Taylor (Amber's mother) about Amber's prior sexual experience.[14] In each instance, the proffered information concerned Amber's prior sexual behavior and the confrontations such behavior caused with her parents.[15]

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[11] *Reporter's Record* at 264 - 265.

[12] *Reporter's. Record* at *270.*

[13] *Reporter's Record* at 292.

[14] *Reporter's Record* at 141 - 142.

[15] *Reporter's Record* at 435-435; 438-439.

This evidence was tendered for the purpose of establishing a motive for Amber to fabricate the accusations against LeJeune. And her incentive was quite simple. The need for Amber to concoct a story arose when she was confronted with the sexually explicit references made to her six-year-old brother, and then was ultimately forced to explain to her parents why she was not a virgin. Amber was facing the same type of encounter with her parents chronicled in Smiley's notes; and she obviously wanted to avoid it. But LeJeune was not allowed to cross-examine any of the witnesses about Amber's sexual history or the statements she made to Smiley, foreclosing his ability to expose her motive.[16]

After all of LeJeune's objections had been overruled, an *in camera* hearing was held. LeJeune presented the psychotherapist's notes, and proffered the testimony of the therapist (Cindy Smiley), Amber McCoy, and Laura Taylor. He urged the trial court to reconsider its previous rulings and specifically argued that evidence of Amber's prior sexual ordeal, coupled with the trouble occasioned by its detection, was admissible because it established a motive for Amber to fabricate the accusations against him. It also rebutted the impression left by Amber and her mother that the alleged offense was the first known sexual encounter Amber had ever experienced.

The judge maintained the original rulings, and LeJeune was prohibited from exposing this information through cross-examination.

ii. The Federal Question Presented

Throughout the course of trial, LeJeune sought to question various witnesses about Amber's previous sexual history. This line of inquiry was spawned by Cindy Smiley's notes from her therapy sessions with Amber. Before the

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[16] *Reporter's Record* at 296-299.

disclosure of these notes -- which came immediately prior to Smiley's testimony -- LeJeune had no idea about Amber's prior sexual activities. Nor did he know that Amber's parents became enraged and severely chastised her after they uncovered this information. Once aware though, LeJeune attempted to ask Smiley, Amber, and Laura Taylor (Amber's mom) about Amber's sexual history.[17]

The prosecutor successfully thwarted LeJeune's efforts by invoking Rule 412 of the Texas Rules of Evidence.[18] This rule generally prohibits the introduction of evidence relating to a complainant's past sexual behavior. But as is seen from the discussion below, both the language and history of Rule 412 are replete with Sixth Amendment protections.[19] So much so in fact, that Rule 412 is intrinsically related to the Sixth Amendment, and ceases to be independent from it. The denial of relief under Rule 412 cannot, therefore, be used to defeat jurisdiction.[20]

After being unsuccessful in the trial court, LeJeune appealed his conviction to the Fourteenth Court of Appeals in Houston. And the relevant points of error specifically invoked his Sixth Amendment protection as it related to Rule 412.[21]

In its opinion, the Court of Appeals nowhere mentions the Sixth Amendment. It does, however, specifically recognize that LeJeune was contesting the trial court's rulings on

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[17] *See* App., *infra*, 16a-27a.

[18] *Id.*

[19] *Infra*, at page 8.

[20] *See generally, Enterprise Irrigation District v. Canal Co.*, 243 U.S. 157, 164 (1917) and *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982).

[21] *See* App., *infra*, 2a-29a.

constitutional grounds.[22] The Court does not suggest that LeJeune neglected to preserve this issue at the trial court level. Should the Court's lack of particular reference to the Sixth Amendment defeat jurisdiction? No, it should not.

A federal claim cannot be entertained by this Court unless it has been *either* raised in the state court, *or* considered and resolved by the state court.[23] It is not essential that the state court's denial of the federal claim "shall have been put in direct terms," it being enough that "the necessary effect of the judgment has been to deny the claim."[24] The goal of course, is to bring the federal claim to the state court's attention with fair precision. And "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."[25] In such cases, it must be said that the state court was provided with an opportunity to "correct a constitutional violation."[26]

Here, the state courts were provided with ample occasion to rectify the constitutional error. LeJeune's insistence on his right to effectively cross-examine the witnesses was prevalent throughout the trial and appellate court proceedings. The Court of Appeals recognized as much when it characterized LeJeune's claim as a constitutional attack. This Court thus has jurisdiction to review the state court's judgment on a writ of certiorari.

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[22] *See* App., *infra*, 1a.

[23] *See McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940) and *Hill v. California*, 401 U.S. 797, 805 (1971).

[24] *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

[25] *Id.*

[26] *See Picard v. Connor*, 404 U.S. 270, 275 (1971).

REASONS FOR GRANTING THE PETITION

1. LeJeune had an undeniable right, through cross-examination and confrontation, to expose evidence that Amber had a motive to fabricate the allegations against him. By supporting the trial court's decision to improperly restrict Lejeune's Sixth Amendment right to cross-examination, the Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

2. The Court of Appeals has also decided an important federal question in a way that conflicts with a decision of its sister court in Amarillo.

A. The Sixth Amendment and Texas Rule of Evidence 412

This case focuses on the right of an accused to adequately cross-examine the witnesses against him, a right guaranteed by the Sixth Amendment to the United States Constitution. The Court of Appeals improperly characterizes it as one involving the trial court's decision to either admit or exclude evidence.[27]

At the heart of this matter – although not articulated by the Panel decision – is the interplay of the right to cross-examination with Rule 412 of the Texas Rules of Evidence; a balance that the trial court struggled to achieve. Competing with the right of an accused to fully confront and cross-examine the witnesses against him, are the provisions contained in Rule 412.[28]

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[27] *See* App., *infra*, 1a.

[28] *See* App., *infra*, 13a.

Rule 412 is derived from the *rape shield statute* enacted by the legislature in 1975.[29] Before the statute was enacted, sexual assault victims sometimes found themselves subjected to abusive, embarrassing and irrelevant inquiries into their private lives, with the result that many assault victims chose not to report the attack rather than face such questioning. Rule 412 – like its predecessor – represents an attempt to eliminate trial practices that may have frustrated society's interest in the prosecution of these crimes.[30]

To this end, Rule 412 generally prohibits proof concerning the victim's character. For example, Subsection (a) provides:

> In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

Subsection (b) further extends the general rule as it relates to specific instances of past sexual behavior, but in doing so, creates some notable exceptions. Evidence that is necessary to rebut or explain scientific evidence offered by the State, evidence that relates to the motive or bias of the alleged victim, and evidence which is *constitutionally required* to be admitted, are all instances that allow for the admission of the alleged victim's past sexual behavior.[31]

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[29] *See* TEX. PENAL CODE ANN. §21.13, later amended and recodified at §22.065 (repealed).

[30] *See Allen v. State*, 700 S.W.2d 924, 929 (Tex. Crim. App. 1985).

[31] App., *infra*, 13a.

It makes perfect sense for the Rule to be crafted in this fashion. Generally speaking, reputation and opinion evidence – *i.e.*, character proof – regarding an alleged victim's past sexual behavior is prohibited. This guards against abusive, embarrassing, and irrelevant inquiries into their private lives, which the original *rape shield statute* was designed to prevent. Questions concerning specific situations of past sexual behavior are likewise forbidden, with the exception of those inquiries that traditional notions of confrontation and cross-examination were designed to safeguard – motive, bias and the need to rebut medical proof offered by the State.

For example, in *Moody*,[32] the Texas Court of Criminal Appeals drew a distinction between evidence merely attacking a witness's character for truthfulness, and evidence showing the witness had a motive or bias that would cause him to lie.[33] The Court concluded that if the evidence established motive or bias, it should be admitted under the constitutional right of confrontation.[34] Indeed, the language of Rule 412(b)(2)(E) stands as recognition that the proscriptions contained in Rule 412 must bow to that which is constitutionally mandated.

As a matter of policy, the law should not operate to discourage alleged sexual assault victims from reporting the crime. Rule 412 offers protection from forays into matters of sexual reputation and opinion that are designed only to embarrass. But it does not shield those who have a specific bias or motive to make a false allegation. To create such a shelter is to trample upon the rights of the accused for the benefit of those whom the Rule was not designed to protect, at the risk of ultimately encouraging instances of false reports.

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[32] *Moody v. State*, 827 S.W.2d 875 (Tex. Crim. App. 1992).

[33] *Id.* at 891.

[34] *Id.*

This Court's holding in *Davis v. Alaska*[35] is instructive in this regard. In *Davis v. Alaska*, this Court found that the state's interest in maintaining the confidentiality of juvenile proceedings was outweighed by a criminal defendant's right to cross-examine a juvenile witness about the effect that the witness' probationary status had on his testimony. In finding that the right of confrontation is paramount to the state's policy of protecting a juvenile, this Court reinforced the fundamental nature of Sixth Amendment protections and established the bedrock necessary to insure that an accused receives a fair trial.[36] In a similar vein, an individual's Sixth Amendment rights simply cannot bow to the fears which prompted the adoption of TEX. R. EVID. 412, formerly the *rape shield statute*.

In LeJeune's case, the State strenuously argued that Amber was credible because she had no reason to lie.[37] Because of the improper limitations placed on cross-examination, LeJeune had no compelling response. This was a close case. The jury sentenced LeJeune to probation and no fine. The ensuing discussion illustrates that the propriety of LeJeune's Sixth Amendment claim is rivaled only by how critical the excluded cross-examination was to his defense.

B. Prior sexual behavior

The Court of Appeals first discusses the statements made by Amber to her therapist, Cindy Smiley. The Court is correct in saying that these statements – specifically those relating to Amber's prior sexual behavior and the problems at

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[35] *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974).

[36] *See also, Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (State's interest in the confidentiality of its investigative child abuse files must yield to Sixth Amendment protections).

[37] *Reporter's Record* at 666-667; 669.

home caused by the discovery of her conduct – were offered, in part, to rebut or explain the State's medical evidence.[38] Instead of directly confronting this issue, the Panel finds that Smiley's *in camera* testimony established that "there was no possible cause for [Amber's] disorder except the sexual assault incident with appellant."[39] This conclusion is based upon an inaccurate characterization of Smiley's testimony and – quite frankly – misses the most important point.

The following exchange occurred during the *in camera* hearing:

> Q. Okay. Is it possible that the sexual encounter that she reported to you due to peer pressure with a same age individual could have been a traumatic event such that it would cause her posttraumatic stress after the fact?
>
> A. In my opinion, no depression, *possibly PTSD*. Not in my opinion.
>
> Q. Okay. Is it conceivable at all that you could be wrong about where the posttraumatic stress comes from?
>
> A. I do not believe so.
>
> Q. So it's not possible that you could be wrong?

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[38] *See* Panel Opinion at 4, *citing* TEX. R. EVID. 412(b)(2)(A), App., *infra*, 1a.

[39] *See* Panel Opinion at 4, App., *infra*, 1a.

A. Oh *I probably could [be wrong]* but I do not believe that I am.[40]

So the record *does* indicate that PTSD could *possibly* have resulted from Amber's prior sexual experience. The more important point is that Smiley *could be wrong* about the reason for Amber's PTSD. Such admission clearly shows that the alleged sexual assault was not *the only possible cause* of Amber's trauma. A few words need to be said.

Amber's statements were admissible under Texas law because they were made for purposes of treatment and diagnosis.[41] "The medical treatment exception to the hearsay rule [TEX. R. EVID. 803(4)] is based on the assumption that the patient appreciates that the effectiveness of the treatment may depend upon the accuracy of the information provided to the physician."[42] Having been cloaked with a presumption of trustworthiness, it is critically important to allow the opinions and conclusions of the expert to be tested in the crucible of cross-examination. Any statements, so long as they are *reasonably pertinent to diagnosis or treatment*, should be admissible – especially for purposes of cross-examination.

The therapist testified that Amber's statements were made so that she (Smiley) could "be able to better diagnose and learn how to treat her . . . ."[43] The predicate had therefore been established, without any limitation being placed on the nature or content of the statements. Since Smiley was expressing an

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[40] *Reporter's Record* at 294-295, lines 13-25 (emphasis added).

[41] *See* TEX. R. EVID. 803(4), App., *infra*, 15a.

[42] *Fleming v. State* ,819 S.W.2d 237, 247 (Tex. App. – Austin 1991, pet. ref'd).

[43] *Reporter's Record* at 262, lines 2-9.

expert medical opinion, all statements were admissible under Rule 803(4).[44] Amber's statements to her therapist were, without doubt, reasonably pertinent to her diagnosis and treatment. The Panel failed to recognize this fact. As a result, LeJeune's Sixth Amendment rights were improperly curtailed – an error that is truly ironic, since state law specifically authorizes this area of inquiry.

Finally – as justification for the limits on LeJeune's ability to cross-examine – the Panel found there was "no evidence that [Amber's] prior sexual relationship was 'traumatic' in any respect . . . ;" the implication being that any non-traumatic event could not be reasonably pertinent to a PTSD diagnosis.[45] But the *trauma* was not due to Amber's prior sexual encounter (although it *was* prompted by peer pressure), but rather was a result of the ensuing conflict at her house once the sexual conduct was unearthed. Smiley's notes demonstrated that Amber's step-father and mother began screaming, cussing, and threatening that they would not support either Amber or her child if she became pregnant.[46] There is even some indication that Children's Protective Services should be called because of the way Amber was treated. It is fairly straightforward that any sexual event – especially one which results in this kind of significant disruption at home – would concern a therapist and would figure into her ultimate diagnosis. At the very least, it would be for the jury to consider whether such evidence tended to rebut or explain the medical proof offered by the State and, ultimately, what significance should be placed on Smiley's concession that she *could be wrong* about the cause of Amber's PTSD. It was for the jury to decide if

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[44] *Reporter's Record* at 289-290.

[45] *See* Panel Opinion at 5, App., *infra*, 1a.

[46] *Reporter's Record* at 292.

Smiley was credible – an assessment which could only be made in the light of complete cross-examination.

The Panel did note that according to the trial court's ruling, "appellant *could* ask the psychotherapist in the jury's presence whether the parent-child conflicts could have caused the disorder."[47] But proof concerning *general* parent-child frictions, absent the specific precipitating event which caused a significant dissension, is completely impotent in its ability to adequately test the believability and reliability of Smiley's expert conclusions.

In similar fashion, LeJeune again attempted to offer – through the cross-examination of Amber and her mother – that exposure of Amber's prior sexual activity led to considerable problems at home. This information was significant enough for Amber to tell her therapist, and for her therapist to note it in Amber's medical record. LeJeune offered such proof as evidence of Amber's motive or basis under Rule 412(b)(2)(C). The Court of Appeals reasons as follows:

> "It is unclear how this particular evidence would establish a motive for complainant to later fabricate the sexual assault episode when she was forced, according to appellant, to admit to her parents that she was no longer a virgin. If her parents were already aware of the prior sexual relationship, as according to the therapist's records and appellant's own argument, then no fabrication was necessary to explain any loss of virginity."[48]

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[47] *See* Panel Opinion at 3-4 (emphasis in original).

[48] *See* Panel Opinion at 4-5.

The motive is plain. Amber gets in severe trouble for prior sexual activity. She is then *caught* relating explicit sexual depictions to her six-year-old brother while her parents are not at home. Her parents immediately become enraged and begin screaming and yelling. Why? Because they are concerned that Amber is still involved with what they consider to be inappropriate sexual activity. It is reasonable to assume that a twelve-year-old would want to avoid an argument where her parents might once again threaten, or even make good, on their prior promises. Therein lies the motive to fabricate whatever is readily convenient in order to shift the focus of the rage.

There was, arguably, no necessity for Amber to fabricate a reason for her loss of virginity -- at least not to her parents. True enough. The need was to concoct a story which spared her from getting in trouble for another sexually related incident. But with a jury as her audience, the demand was somewhat different. The "outcry" incident could easily have been crafted to create the impression that Amber, but for the alleged incident involving LeJeune, was still a virgin. What better way to elicit sympathy and credibility for Amber, while at the same time generating a feeling of disgust toward LeJeune? And it may well be that Amber's step-father did not know about her previous sexual activity. Amber indicated that she had talked with her mother about sex before, but it was her step-father who questioned her about being a virgin.[49] Maybe he was ignorant of her past liaison. Amber would indeed have a motive to lie if that were the case.

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[49] *Reporter's Record* at 353-355.

C. The Court of Appeals' decision is in conflict with *Yzaguirre v. State*

This case should be controlled by the Amarillo Court's opinion in *Yzaguirre*.[50] In *Yzaguirre*, the trial court excluded evidence that the complainant's mother had chastised her son (the complainant) after she caught him comparing genitals with a cousin. When she discovered the defendant in bed with her son, the complainant (her son) first denied that anything happened. But he told his mother later that the defendant had been molesting him. The Court of Appeals reversed, reasoning that the excluded testimony showed the complainant had been in trouble for inappropriate sexual behavior in the past, and therefore had a motive to place the blame on someone else when caught a second time.

The Panel attempts to distinguish *Yzaguirre* because Amber was not "caught" engaging in inappropriate behavior with LeJeune while at the pool.[51] This is a distinction that makes absolutely no difference.

Amber was "caught" when her mother and step-father confronted her about why her six-year-old brother would be using sexually explicit language. Like the defendant in *Yzaguirre*, Amber had previously been disciplined because of her sexual relations with a boy and she knew that such relations would not be tolerated.[52] It could be that she was again involved in similar conduct and was scared that her parents would find out. We don't know for sure because LeJeune was not allowed to question Amber about her motivations. This is very similar to the situation presented in *Yzaguirre*. There is no

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[50] *Yzaguirre v. State*, 938 S.W.2d 127 (Tex. App. – Amarillo 1996, pet. ref'd).

[51] *See* Panel Opinion at 6, App., *infra*, 1a.

[52] *Reporter's Record* at 106-107.

question that Amber had a motive to "fabricate appellant's involvement in the offense rather than suffer the promised punishment for [her] own sexual conduct."[53]

The important and controlling characteristics of *Yzaguirre* are (1) knowledge and disapproval of the complainant's previous sexual conduct, coupled with (2) the complainant's understanding that subsequent actions will be met with condemnation. There cannot logically be any requirement that the prior sexual incident involved the same individual who later turns out to be the defendant.

D. A new test?

The Court of Appeals concludes that "evidence of the complainant's prior sexual relationship with a peer and events or fears regarding her parents' relationship do not make it *more likely that she would fabricate* sexual assault charges against appellant in the instant case."[54] The Court cites no authority for this "more-likely-than-not" test. What can be said is that such a test cannot be countenanced if it operates to abrogate one's Sixth Amendment rights. And curiously lost throughout the Court's discussion is LeJeune's Sixth Amendment right to cross-examination. A right that must be liberally construed in order to insure that a defendant receives all the protection intended by the Constitution.[55] It is the jury's province to decide what is *likely* and what *is not*. And that determination must be born from unfettered facts. For it is sometimes the case that the truth is *unlikely*.

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[53] *Yzaguirre*, 938 S.W.2d at 129.

[54] *See* Panel Opinion at 7 (emphasis added), App., *infra*, 1a.

[55] *See Davis v. Alaska*, 415 U.S. 308 (1974).

E. The paucity of evidence against LeJeune highlights the need for proper cross-examination

The following is a list of the most glaring facts and inconsistencies presented in this case, all of which demonstrate the harm created by the improper limitations on LeJeune's ability to cross-examination.

- All of the witnesses agreed that there were a lot of people at the relatively small apartment complex pool on the night of the alleged incident. The estimates ranged from 8-10 people, depending upon whom the jury chose to believe.[56]

- It was LeJeune's 10th wedding anniversary, and he was at the pool with his wife, their three small children, and two relatives who were visiting from out-of-town.[57]

- Although she denied seeing LeJeune's family, Amber admits that LeJeune's youngest son, Caleb, was at the pool. At least that is what she told the investigating police officer.[58] It is not known why LeJeune's young son would be at the swimming pool without any family supervision.

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[56] *Reporter's Record* at 49; 102; 137; 196; 405; 462; 463; 501; 533; 534; 606.

[57] *Reporter's Record* at 500; 533.

[58] *Reporter's Record* at 416.

- The alleged incident took place within five feet from where a group of people was standing.[59] Amber testified that she was 2-3 feet away from the group when LeJeune grabbed her and began to fondle her.[60] All of this took place in an area where everyone could comfortably stand in the water.

- The alleged assault took 10-15 minutes.[61]

- There is no evidence that anyone heard or observed anything unusual during this time, even though Melinda – a family friend – was at the pool to specifically keep an eye on Amber.[62]

- Candace Ward's testimony that Amber looked scared and was giving her weird looks,[63] is belied by the fact that these observations were not told to the investigating officer when she gave her statement approximately one week after the alleged incident.[64] Given Amber's version of the very adult-like discussion she had with LeJeune during the assault – *i.e.*, "I'm a little young," "Don't you have a wife,"[65] – it's hard to imagine that

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[59] *Reporter's Record* at 17; 32.

[60] *Reporter's Record* at 410; 412.

[61] *Reporter's Record* at 347.

[62] *Reporter's Record* at128; 414.

[63] *Reporter's Record* at 14; 17.

[64] *Reporter's Record* at 47; 48.

[65] *Reporter's Record* at 337.

she exhibited any signs of distress. It is equally difficult to fathom why no one else in such close proximity overheard this alleged conversation. None of this testimony can credibly be reconciled.

- The testimony that LeJeune told Amber he was going to "come back and fuck her" is unadulterated fabrication.[66] As is the contention that Amber now sleeps with a butcher knife under her bed.[67] None of this highly crucial information was ever reported to the police by either Amber or her parents.[68] Such an "oversight" defies human experience and simply cannot be considered credible.

- There was no medical evidence of sexual assault.[69]

- LeJeune was not allowed to give a statement after he was arrested because he denied the allegations,[70] and police department policy does not allow statements to be taken if the accused denies the offense.

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[66] *Reporter's Record* at 108; 374.

[67] *Reporter's Record* at 114; 374.

[68] *Reporter's Record* at 440.

[69] *Reporter's Record* at 230; 246-247.

[70] *Reporter's Record* at 208; 595; 597.

- While in custody, LeJeune both offered and demanded to take a polygraph test.[71] This is evidence of innocence to the same extent that fleeing from the police is evidence of guilt.

It might seem – at first blush – that LeJeune was able to glean his fair share of exonerating facts. But at the end of the day, he was called upon to answer the arguments of the prosecutor:

> "Cindy Smiley is treating the complaining witness for post traumatic stress disorder . . . she didn't feel after all her training and all the people she's counseled that the complaining witness was fabricating or lying or not telling the truth.
>
> Finally . . . you heard from Amber. And the main question you have to ask yourself is why would she lie about this? Why would she make this up?
>
> This charge here says you can only consider the law and the evidence you heard in this courtroom . . . you can't be thinking about what might have happened about what could have happened . . . Why would a child make this up? She had zero, zero, reason to make this up.[72]
>
> Amber McCoy is telling the truth. There is no evidence that indicates that she has reason not to."[73]

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[71] *Reporter's Record* at 594; 596.

[72] *Reporter's Record* at 666-667.

[73] *Reporter's Record* at 669.

The problem is that there was admissible evidence to indicate Amber had a reason to lie, a reason to fabricate, a reason to make this up. And that evidence should have been allowed before the jury. The jury was looking for such evidence. They specifically informed the trial judge at the punishment hearing that they did not want LeJeune to serve any time in prison.[74] There must surely have been some doubt.

Amber's truthfulness was the key to the State's case. The claim of bias and motive LeJeune sought to develop was necessary to create an inference that Amber fabricated the accusations against him to avoid similar, or more severe punishment than she suffered the first time there was a confrontation over her sexual behavior.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GAITHER & AMANN

By:_____

COLIN B. AMANN
Texas Bar No. 01138100
4300 Scotland
Houston, Texas 77007
(713) 865-5600
(713) 865-5611 (Facsimile)
Counsel for Petitioner

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[74] Clerk's Record at 118.

APPENDIX A

OFFICIAL NOTICE FROM THE
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

November 1 , 2000
COA#: 14-98-00442-CR
RE: Case No. 1519-00
Style: LEJEUNE, JOSEPH KEVIN

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Colin B. Amann
Gaither & Amann
4300 Scotland
Houston, TX 77007

APPENDIX B

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

July 13, 2000

RE: Case No. 14-98-00442-CR

Style: LeJeune, Joseph Kevin
v. The State of Texas

Please be advised that on this date, the Court DENIED motion for en banc consideration in the above cause.

T.C. Case # 727,975

Ed Well, Clerk

Colin B. Amann
Gaither & Amann
4300 Scotland
Houston, TX 77007

APPENDIX C

Affirmed and Opinion filed March 23, 2000

In the

Fourteenth Court of Appeals

NO. 14-98-00442-CR

JOSEPH KEVIN LEJEUNE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 727,975

OPINION

Joseph Kevin LeJeune, appellant, was found guilty of felony sexual assault of a child and sentenced by the jury to ten years community supervision. He presents thirteen points of error on appeal, grouped into complaints regarding (i) the trial court's exclusion of certain evidence; (ii) the trial court's designation of the complainant's mother as the outcry witness; (iii) legal and factual insufficiency of the evidence; and (iv)

the trial court's failure to grant a mistrial following an unsolicited statement from the complainant that appellant had attempted to sexually assault complainant's friend. We affirm. Complainant, who was twelve years old at the time of the offense, was at her apartment pool with her friend and some other residents, including appellant. Appellant resided at the complex with his wife and two small children. Complainant testified that shortly after it started getting dark, appellant swam up behind her and grabbed her around the waist, groping and fondling her as he pulled her towards the other end of the pool. She stated she was too confused and frightened to scream, but that she kept looking at her friend trying to get her attention. Appellant penetrated her with his finger several times and attempted to penetrate her with his penis, at which point the complainant lied that her mom was on her way over and appellant let her go. Complainant swam back to her friend and they immediately left. Later that evening, complainant told her friend what had happened. At trial, appellant and his wife testified that nothing had transpired between appellant and complainant at the pool that evening.

Complainant did not tell her parents about the incident, but they noticed she was not acting like herself. She refused to go swimming, would only fall asleep with the television on, and was withdrawn. Complainant eventually broke down crying and told her parents about the assault, after they had confronted her about an alleged sexually explicit comment she made to her younger brother regarding a television show. Her mother called the police and appellant was charged with aggravated sexual assault.

In his first eight points of error, appellant complains that the trial court erred in not allowing him to ask certain questions during his cross-examination of complainant's mother, of the psychotherapist and of appellant's relative. Appellant sought to introduce evidence of complainant's prior sexual experience with a boy her age, her fears about her parents' relationship, the emotional stability of her home, and certain prior police

reports filed by her mother. It was appellant's position that this evidence was admissible as it tended to establish a motive for complainant to fabricate accusations against appellant, and to rebut medical testimony that the complainant was suffering from post-traumatic stress disorder caused by the alleged sexual assault. Appellant contends the trial court's denial of these questions violated his constitutional right to cross-examine witnesses. We will examine and discuss each proposed area of questioning separately under appellant's first eight points of error.

A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion. *Green v. State*, 934 S.W.2d 92, 101-102 (Tex.Crim.App. 1996), *cert. denied*, 117 S.Ct. 1561 (1997). A trial court is given wide discretion in determining the admissibility of evidence. *Breeding v. State*, 809 S.W.2d 661, 663 (Tex.App. – Amarillo 1991, pet. ref'd). A trial court has not abused its discretion unless it has "acted arbitrarily and unreasonably, without reference to any guiding rules or principles." *Breeding*, 809 S.W.2d at 663. Exclusion of evidence does not result in reversible error unless the exclusion affects a substantial right of the accused. *Id.*; see TEX.R.APP.P 44.2(b).

Appellant specifically complains that he was not allowed to question complainant's psychotherapist regarding complainant's alleged statement that she got into trouble for having sex with a boy her age a few months prior to this incident, or that she had a negative relationship with her mother and an upsetting home life. Appellant argues this was admissible for impeachment purposes and admissible under TEX.R.EVID. Rule 412(b)(a)(A) to rebut or explain the State's medical evidence by suggesting that complainant's post-traumatic stress disorder may have arisen not from a sexual assault but from complainant's stressful home life or from the earlier sexual relationship with a peer.

We note, however, that when appellant asked these questions *in camera* during trial, the therapist testified that in

her opinion, the conflict between complainant and her parents, or a prior episode of sex with a peer, even one with a hypothetical "older man" years beforehand, would not have caused complainant's post-traumatic stress disorder. In fact, the therapist stated that in her opinion based on what the complainant had told her, there was no other possible cause for the disorder except the sexual incident with appellant. Furthermore, following the *in camera* presentation the trial court ruled that appellant *could* ask the psychotherapist in the jury's presence whether the parent-child conflicts could have caused the disorder.

We find no error by the trial court in refusing to allow appellant to question the psychotherapist about complainant's alleged prior sexual episode with a peer as a possible cause of the post-traumatic stress disorder. Given the psychotherapist's answers to these questions during the *in camera* hearing, she clearly stated that based on the facts presented by complainant, the only possible cause was the trauma of appellant's sexual assault. Appellant's proposed line of questioning did not explain or rebut the therapist's medical records or diagnosis, and did not stand as an exception under Rule 412(b)(2)(A).

Nor do we find error by the trial court in excluding police reports made by complainant's mother of a single gunshot being heard in the neighborhood; of complainant's father requesting police to check on his family as no one was answering the telephone; of the mother reporting two juvenile males harassing her daughter at the pool; of the mother complaining of a neighborhood boy sitting on the stairs who stole a skateboard; a complaint of loud music, and a complaint by the mother that the father was drunk and that she didn't want the children upset. While appellant claims these reports establish sources of stress for complainant, we agree with the trial court that they had no application to the issues of the case, and appellant did not meet his burden of showing they were material and relevant.

In similar fashion, we find no error by the trial court in

excluding evidence that "when [complainant] had a consensual sexual experience a few months prior to the alleged offense, she had gotten into trouble" with her mother, as argued by appellant in his brief. Appellant contends that under Rule 412(b)(2)(C), this evidence relates to complainant's motive or bias. It is unclear how this particular evidence would establish a motive for complainant to later fabricate the sexual assault episode when she was forced, according to appellant, to admit to her parents that she was no longer a virgin. If her parents were already aware of the prior sexual relationship, as according to the therapist's records and appellant's own argument, then no fabrication was necessary to explain any loss of virginity. Nor would such evidence be admissible under Rule 803(4) as reasonably pertinent to diagnosis or treatment, as there was no evidence that the prior sexual relationship was "traumatic" in any respect, and the therapist had already testified outside the presence of the jury that in her opinion, the prior sexual relationship was not a cause of complainant's post-traumatic stress disorder.

While appellant argues that this issue is controlled by *Yzaguirre v. State*, 938 S.W.2d 127 (Tex.App. – Amarillo 1996, pet.ref'd), we disagree. In *Yzaguirre*, the trial court excluded testimony that the complainant's mother had chastised her son (the complainant) for comparing genitals with a male cousin. When the mother later discovered the defendant in bed with her son, the complainant first stated nothing had happened, then said the defendant had molested him. The defendant stated he had been napping when the complainant crawled into bed with him, and that it was the complainant who molested *him*. The court of appeals reversed, holding that the excluded testimony showed that complainant had been in trouble for inappropriate sexual behavior in the past and therefore had a motive to lie when caught a second time.

The controlling factual distinction between *Yzaguirre* and appellant's case here is that complainant was not "caught" in inappropriate behavior with the appellant in the pool; in

fact, appellant denied the alleged event occurred. The compelling need for complainant to blame appellant for misadventure observed by a third party simply does not exist in the instant case, nor do we find that her parents' concern over her explanation of a provocative television show to her younger brother rises to this level of a compelling event. The circumstances of this case are similar to those in *Wofford v. State*, 903 S.W.2d 796 (Tex.App. – Dallas 1995, pet.ref'd), where defendant sought to establish a motive for the complainant to fabricate sexual assault by showing she had offered sex in exchange for cocaine then filed charges against him when he refused to buy more cocaine. The court of appeals affirmed the exclusion of such evidence, holding that appellant could not impeach complainant's credibility with specific instances of prior misconduct, and that complainant's sexual history did not make it more likely that she would fabricate charges against him in retaliation for a refusal to buy more drugs.

In similar light, evidence of the complainant's prior sexual relationship with a peer and events or fears regarding her parents' relationship do not make it more likely that she would fabricate sexual assault charges against appellant in the instant case. No error has been shown, and appellant's first eight points of error are overruled.

Under points of error nine and ten, appellant complains of the trial court's designation of complainant's mother as the outcry witness. According to appellant, an individual at the pool known only as "Tim," should have been named as the outcry witness, as the complainant had told him that appellant "tried to do stuff" to her.

Under TEX. CODE CRIM. PROC. ANN. Art. 38.072 (Vernon Supp. 1999), a hearsay statement made by a child under twelve years of age, against whom a sexual assault was allegedly committed, is admissible if it is made to the first person eighteen years of age or older to whom the child made a statement about the offense. The statement must be "more

than words which give a general allusion that something in the area of child abuse was going on." *Molina v. State*, 971 S.W.2d 676, 682 (Tex.App. – Houston [14th Dist.] 1998, no pet.), citing *Garcia v. State*, 792 S.W.2d 88, 91 (Tex.Crim.App.1990). While arguably complainant's friend may have told "Tim" in detail about the offense, complainant herself only generally told him that appellant "tried to do stuff" to her. This was not a sufficient description of the sexual assault to constitute an outcry statement, and the trial court did not err in determining that complainant's mother was the outcry witness. *See Hayden v. State*, 928 S.W.2d 229 (Tex.App. – Houston [14th Dist.] 1996, pet. ref'd)(holding that the trial court did not err in finding a CPS caseworker to be the true outcry witness despite the child's earlier, more generalized statement to a school counselor). That complainant's friend may have given details of the offense to Tim is immaterial; under the statute, the statement must have been made by complainant herself. Appellant's ninth and tenth points of error are overruled.

By his eleventh and twelfth points of error, appellant raises legal and factual insufficiency of the evidence. As grounds, appellant re-states the testimony of each witness, points out various inconsistencies among the witnesses, and argues that taken as a whole, the evidence is not credible to support the conviction.

The standard of review for testing legal sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Clewis v. State*, 922 S.W.2d 126, 132 (Tex.Crim.App. 1996). If there is evidence that establishes guilt beyond a reasonable doubt and if the factfinder believes the evidence, the reviewing court is not in a position to reverse the judgment on sufficiency of the evidence grounds. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App.1988). To review the factual sufficiency of the evidence, the reviewing court views all of the evidence without the prism of "in the light most favorable to the

prosecution" and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex.Crim.App. 1996). The appellate court should be appropriately deferential so as to avoid substituting its own judgment for that of the jury below. *Id.* at 133.

We find the evidence to be both legally and factually sufficient to support the conviction. While it is true that discrepancies existed in the evidence, it was up to the jury to weigh these discrepancies and the credibility of each witness to reach a verdict, and we cannot substitute our own testing of the credibility and inconsistencies. Appellant's eleventh and twelfth points of error are overruled.

In his thirteenth and final point of error, appellant contends that the trial court erred in failing to grant a mistrial following an unresponsive answer by the complainant during cross-examination. In answer to a question from appellant as to whether complainant stayed up all night and told her friend about what had happened, complainant had said, "Yes, but she told me that he had tried to do that to her–" at which point appellant had objected and requested an instruction to disregard and a mistrial. The trial court granted the objection and instructed the jury not to consider complainant's answer for any purpose, but denied a mistrial. The trial court's instruction to the jury was sufficient to cure any harm appellant may have suffered as a result of the inadvertent testimony of complainant, and no error is shown. *See Coe v. State*, 683 S.W.2d 431, 436 (Tex.Crim.App. 1984). Appellant's thirteenth point of error is overruled.

The judgment is affirmed.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed March 23, 2000.
Panel consists of Justices Robertson, Sears and Lee*
Do Not Publish – TEX.R.APP. P. 47.3(b).

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* Senior Justices Sam Robertson, Ross A. Sears and Norman R. Lee, sitting by assignment

APPENDIX D

TEX.R.EVID 412. EVIDENCE OF PREVIOUS SEXUAL CONDUCT IN CRIMINAL CASES

(a) Reputation or Opinion Evidence. In a Prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) Evidence of Specific Instances. In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence;

(A) that is necessary to rebut or explain scientific or medical evidence offered by the State;

(B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged;

(C) that relates to the motive or bias of the alleged victim;

(D) is admissible under Rule 609; or

(E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) Procedure for Offering Evidence. If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits or refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) Record Sealed. The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

(e) Sexual Conduct of Child as Defense. This rule does not limit the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years old or older as a defense to sexual assault, aggravated sexual assault, indecency with a child or an attempt to commit any of the foregoing crimes. If such evidence is admitted, the court shall instruct the jury as to the purpose of the evidence and as to its limited use.

APPENDIX E

TEX.R.EVID. 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

APPENDIX F

RECORD EXCERPT ONE

THE COURT: The prior sexual incident you're referring to is a consensual incident with a peer?

MS. WEAVER: Yes.

MR. AMANN: And Judge, Rule 412 does speak to evidence that is necessary to rebut, explain, to rebut or explain scientific or medical evidence offered by the State. Posttraumatic stress disorder has been offered as a scientific medical explanation for the symptoms observed by Ms. Smiley in Amber and certainly these other statements would serve to better explain that diagnosis or at least in our opinion could.

THE COURT: Why doesn't it come in under that Ms. Ring?

MS. RING: Well, if I'm following the line of thinking that Counsel is going on are they trying – they're trying to go say that having sex with another person is a traumatic event and that is what has triggered this disorder as opposed to the sexual assault alleged by this Defendant. I think that we've made it very clear that it wasn't a traumatic event it was a consensual sexual encounter with a peer. It's not if that's what Counsel is trying to argue. That would be my position.

THE COURT: Tell you what, why don't you ask your question of the witness and get an answer and let's see what it is?

(Outside the presence of the jury).

BY MS. WEAVER:

Q: When Amber was in counseling and reported to you of an episode which erupted between she and her parents is it possible that the hostility that took place at that time – gosh this just gets terrible – is as much a factor of posttraumatic stress as any other alleged incident that she has told you about, could that also be the beginning of posttraumatic stress in this child?

A: In my opinion, no.

Q: Okay. Is it possible that the sexual encounter that she reported to you due to peer pressure with a same age individual could have been a traumatic event such that it would cause her posttraumatic stress after the fact?

A: In my opinion, no depression, possibly PTSD. Not in my opinion.

Q: Okay. Is it conceivable at all that you could be wrong about where the posttraumatic stress comes from?

A: I do not believe so.

Q: So it's not possible that you could be wrong?

A: Oh I probably could but I do not believe that I am.

Q: Is it any possibility that given the background of this family and the dynamics that you yourself witnessed and noted in your own counseling sessions reports that Amber may or may not have had a sexual encounter with someone else and has transferred this to the

Defendant?

A: That was a really long question. Could you ask me that again? I'm sorry.

Q: Okay. Is it possible that Amber may have had a prior sexual experience with an older man not the Defendant, years ago?

A: No I do not believe so.

Q: You don't believe so?

A: No. I do not think it is possible.

Q: Okay. So children of sexual assault or child abuse never have repressed memories that come up later?

A: Yes, but usually not at 12.

Q: Usually not at 12?

A: Not at 12. Usually it's much later. If it was early in life you know early as in childhood they usually do not surface until well into adolescents.

Q: Okay. I just want to be real clear. You're saying that there's no possible way that you could be wrong about when Amber was or had any type of sexual abuse take place to her, is that correct?

A: I could always be wrong.

Q: The answer is yes or no?

A: Yes of course.

Q: And if I understand you correctly there is no possible way that Amber could have had a prior sexual experience early on with an older man and she may be transferring that stress or concern or allegation to the Defendant?

A: In my opinion, in my professional opinion, no.

Q: And also there is no possible way that Amber would have a repressed memory of any type of sexual abuse from someone other than the Defendant and it wouldn't come up at 12?

A: There was no evidence of that.

Q: No. My question wasn't there was evidence of that my question was whether or not that's possible. Is it possible that a child could have had a memory and something triggered it and it has come to the forefront and she now, according to you has posttraumatic stress disorder?

A: In my professional opinion again, no.

Q: Okay.

THE COURT: Here is what I'm going to let you do. I'm going to let you ask the questions about is it possible that conflict between the complainant and her parents could have caused her posttraumatic stress disorder. That's fine. What I don't want you to ask is did the complainant tell you that she had sex with somebody at sometime. Did the complainant tell you that she, you know, had sex with a friend?

MS. WEAVER: So there would be no way for me to impeach the reliability, the information that she gave to her

therapist? I mean if she has lied to the therapist and she has given conflicting stories to different individuals where she says to the therapist you know I had a consensual sexual relationship but she tells her mother, she tells the police, she tells other people you know no history and I was sexually assaulted. And no record with the doctor that she says that she had a prior sexual experience with a peer even consensual of any kind. And I mean if I can't go into it I can't – I certainly can't ask Amber.

THE COURT: Right. That's my ruling.

MR. AMANN: Judge, just not to quarrel with the ruling but as to why the past sexual experience is being offered number one I think it's being offered as an exception to the hearsay rule as a statement made for purposes of treatment or diagnosis and it's allowed by the rules. I also think it's allowable under Rule 412, that portion that says that we are allowed to get into past sexual experiences to the extent that it is necessary to rebut or explain scientific or medical evidence offered by the State, and I'm also offering it as relevant to Amber's credibility and her mother's credibility, and I'm also offering it as impeachment proof of we have had the mother testify that they had a good relationship, communication was open and apparently from the notes that is not the case, and that is clearly impeachment and I understand those objections have been overruled. Just so the record is extremely clear I think it's a logical argument to be made that if Amber were having some kind of prior sexual relationship with a boy that she knew would be disapproved because of her age or looked unfavorably upon because of her age with her parents. We have evidence of that, the big rowel that came up that when she was confronted with are you still a virgin? Why would they ask if she's a virgin? If we have evidence of that it impeaches that but the whole blow up in my posttraumatic stress disorder and it's for the jury to disregard and Ms. Smiley but it's for the jury to decide whether or not that's a possibility through the testimony of Ms. Smiley and

that's – I understand my objections have been overruled.

THE COURT: Right.[1]

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[1] *Reporter's Record* at 292-299.

APPENDIX G

RECORD EXCERPT TWO

MR AMANN: The question I was going to ask was whether it has to do with 412 material, whether Amber had ever been in any confrontation with her mother and father before over her having sex maybe she told Ms. Smiley about and I think my question would relate to – she said that she did not want to tell her mother because what she's testified to and I think my theory would be that it's more like if you told them of anything having to do with this that you would be in the same kind of deep trouble that you were in before and I think that's relevant.

THE COURT: I don't want you to go into it.

MR. AMANN: Okay.

THE COURT: I assume the State would object and I would sustain the objection.

MS. RING: Yes, Your Honor.

MR. AMANN: Okay.[2]

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[2] *Reporter's Record* at 435-436.

APPENDIX H

RECORD EXCERPT THREE

MR. AMANN: Judge I just need to make the same offer. She testified – I need to make the same offer relative to Rule 412, that her dad had upset her. Mom is upset and crying and she has testified that she was not in trouble and based on – I think that would allow me to elicit testimony that they found out she had been having sex and that's why she was crying on this occasion because she thought it would lead to another blow-up, which she described to her counselor.

THE COURT: I still don't think it's relevant.

MR. AMANN: Okay.

MS. RING: I'll object to it, Your Honor.

THE COURT: My ruling is the same.

MR. AMANN: Sustained.

THE COURT: Uh-huh.[3]

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[3] *Reporter's Record* at 438-439.

APPENDIX I

RECORD EXCERPT FOUR

MR. AMANN: Judge what I propose to do is make a proffer on at least one of the issues and then if the Court doesn't feel comfortable with the proffer or in your discretion want to hear more we can put on Amber but I'm going to make my proffer first and maybe expedite the situation.

THE COURT: And this is going to be a sealed record under 404 right?

MR. AMANN: That's fine with me that we have this designated separate hearing.

During the course of Amber's testimony and during the course of Monique's testimony I approached and asked the court if I could go into matters regarding Amber's prior sexual involvement. Based on the notes, which I believe have been labeled as Court's Exhibits of Cindy Smiley and based upon the conversations that Amber had with Monique. My proffer would be that approximately four months prior to this alleged incident that Amber under peer pressure had sex with another boy her age. That boy's name I believe would come out to be Corey. Amber apparently told her mom about it which belies the representation that she has made to the jury that when something bad of a sexual nature happens to her that she doesn't want to tell because she thinks somebody will feel poorly about them.

Number 1 she tells her mom. A big fight ensues; that a big fight ensued between her mother and I would also offer this through her mother that a fight ensued between the mother, the father and Amber and that it was a big blow-up and that they were extremely hard on her after that. They threatened that they would not support her if she got pregnant in the future. They

would not take care of any child and started severely restricting her. That is directly in contravention to Amber's representation to this jury that when confronted with the incident with Jarrett and the outcry takes place that she represented to the jury that she represented to her parents that I no longer consider myself to be a virgin because of what happened, the implication being that she had been a virgin before, which is false.

It also, in my mind Your Honor, is extremely relevant and admissible under 412 and admissible through the Smiley notes under the 412 also and the hearsay exception for medical treatment and diagnosis that Amber knew that sexual matters coming up involving her in front of her parents caused big problems.

When Jarrett tells mama about Amber talking to Jarrett about a sexual situation mama gets mad. We have the testimony that mama is crying, daddy is yelling. I mean it's not like what's going on. The impression is it's immediate and the reason it's immediate is because it's happened before.

Now Amber in that situation, I think I can logically argue, does not want to either admit being involved in other sexual activity that her parents don't know about or she wants to avoid the whole situation and thus I can credibly argue that this situation was created as a way of avoiding a problem, another problem, a problem through history. She knew what exist and I would show that through the testimony of Laura Taylor. I would show that through the testimony of Amber Taylor and I would show that through the – who else was I talking about, those two.

And I approached I believe on each occasion and tried to offer that and the State objected on – I don't know what the grounds were, probably relevancy or 412 whatever those objections were. Those objections were sustained.

With that proffer in mind I think the evidence is extremely relevant. I think it's admissible under 412 and I think

it's admissible out of Amber's mouth as statements she made to her clinical psychologist who was treating her for a medical ailment.

That is my proffer.

THE COURT: Okay. I don't have a problem with your proffer I'm just not letting the evidence in.

MR. AMANN: So all of my objections that I have made previously are again overruled in light of my proffer?

THE COURT: Well it's not really your objections but your proffer I'm not allowing it in. I'm not letting that evidence in so I assume that preserves any error.

* * * *

MS. RING: Your Honor I did tender Counsel a copy of Amber's counseling records and if indeed those are going to be part of the proffer I would ask that they be sealed.

MR. AMANN: You want to now tender the ones I've not highlighted?

MS. RING: It doesn't matter if you tender the highlighted, doesn't matter to me as long as they do get tendered. If they don't get tendered give them back to me and if they do that they are sealed.

MR. AMANN: Did you ever mark the Court's Exhibits for these? Do you remember at one time I thought they had been marked?

Well if we could have the records of Ms. Smiley then marked as Court Exhibits and made part of the record for appellate purposes.

THE COURT: Those need to be sealed. Anything else?

MR. AMANN: No Your Honor.

THE COURT: Okay. Off the record.[4]

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[4] *Reporter's Record* (Evidence Proffer)at 3-7; 12-13.

APPENDIX J

SELECTED POINTS OF ERROR FROM LEJEUNE'S ORIGINAL STATE COURT BRIEF

APPELLANT'S POINT OF ERROR NUMBER ONE

The trial court erred in excluding evidence of statements made by the complaining witness to her psychotherapist which were admissible under TEX.R.EVID. 412(b)(2)(C) and 412 (b)(3), thereby violating appellant's rights under the Sixth Amendment to the United States Constitution.

APPELLANT'S POINT OF ERROR NUMBER TWO

The trial court erred in excluding evidence of statements made by the complaining witness to her psychotherapist regarding previous sexual conduct which were admissible under TEX.R.EVID. 412(b)(2)(C) and 412 (b)(3), thereby violating appellant's rights under the Sixth Amendment to the United States Constitution.

APPELLANT'S POINT OF ERROR NUMBER THREE

The trial court erred in excluding evidence of statements made by the complaining witness to her psychotherapist which were admissible as an exception to the hearsay rule under TEX.R.EVID. 803 (4), thereby violating appellant's rights under the Sixth Amendment to the United States Constitution.

APPELLANT'S POINT OF ERROR NUMBER SIX

The trial court erred in denying appellant the opportunity to cross-examine Laura Taylor about a confrontation concerning the alleged victim's prior sexual behavior which was a proper area of inquiry under TEX.R.EVID. 412(b)(2)(C) and 412 (b)(3), thereby violating appellant's rights under the Sixth Amendment to the United States Constitution.[5]

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[5] Brief for Appellant.